Compuware Corporation *and* Laurence Schillinger. Case 7–CA–36731

December 18, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On September 7, 1995, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a brief in support.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order as modified.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Compuware Corporation, Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except the attached notice is substituted for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against employees because they engage in concerted activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Laurence Schillinger immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

COMPUWARE CORPORATION

Dennis Boren, Esq., for the General Counsel.
Anthony J. Rusciano, of Detroit, Michigan, and *Daniel M. Sak, Esq.*, of Farmington Hills, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me on June 12 and 13, 1995, at Detroit, Michigan, upon the General Counsel's complaint that alleged that on August 22, 1994,[1] the Respondent discharged Laurence Schillinger in violation of Section 8(a)(1) and (3) of the National Labor Relations Act.

The Respondent admitted the discharge of Schillinger on August 22, but denied that it had engaged in a violation of the Act. The Respondent affirmatively contends that the activity for which Schillinger was discharged was not concerted or protected by Section 7 of the Act.

Upon the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Michigan corporation engaged in providing computer software and services to various companies, during the course of which business it annually derives gross revenues in excess of $1 million and annually provides services to customers outside the State of Michigan in excess of $50,000. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and 2(7) of the Act.

II. THE ALLEGES UNFAIR LABOR PRACTICES

A. *The Facts in Brief*

There is no significant dispute concerning the material facts. KPMG Peat Marwick had a contract with the State of Michigan for an extensive upgrading of the State's computer system. Peat Marwich in turn contracted with the Respondent to furnish support personnel to train state employees on he new system. The Respondent then hired about 38 employees

[1] We have modified the notice to employees to conform to language of the recommended Order.

[1] All dates are in 1994 unless otherwise indicated.

on a temporary basis to work as trainers. (When the Peat Marwich project was completed in November, about one-half of the temporary employees were given other jobs with the Respondent.)

The Charging Party, Laurence Schillinger, was interviewed and by letter of July 6 was offered a temporary trainer position. His job, as that of all the trainers, was to learn specific courses, become certified to teach them, and do so. While the hiring letter stated that he was to work approximately 40 hours a week, it happened that the trainers were required to put in much longer hours—usually 57 or so each week.

In addition to the long hours plus a substantial commute for most trainers, Schillinger testified to other employment concerns, such as inadequate preparation time, and the failure of the Respondent to pay overtime premiums.

Schillinger testified that almost from the beginning of his employment he discussed these problems with other employees. And on the morning of August 19, Schillinger had a discussion about these matters with Master Trainer Michael Wilhite (whom the parties stipulated was an employee and not a supervisor within the meaning of Section 2(11) of the Act), at which employees Hugh Kessler and Roger Diamond were present. During this discussion, Schillinger became agitated and told Wilhite that if nothing satisfactory was done, he would express these concerns at a meeting scheduled that afternoon at which there would be representatives of the State as well as Peat Marwich.

Wilhite told Schillinger that it would be improper for him to bring up these problems at the meeting with state representatives, to which, Wilhite testified, Schillinger said, ''We'll see.'' Wilhite called John Hess, the Respondent's account manager for this project to report Schillinger's intent. Hess was not available and Wilhite left a voice mail message; but he also called James Michael Mutter, who at the time was the Peat Marwich on site team leader for the project.

Mutter was concerned that Schillinger would in fact raise these issues with the client, and absent assurance he would not, Mutter wanted him taken off the project. Mutter and Hess testified that Peat Marwick retained the right to require the Respondent to withdraw any employee from the project.

Hess returned Wilhite's call, learned of the situation and came to the project. He talked with Schillinger and Wilhite and at Schillinger's invitation, joined several trainers for lunch to talk about various work related problems. Shortly thereafter, Hess talked to Mutter, who stated he was so concerned that Schillinger might bypass the chain of command that he was considering canceling the meeting. Mutter asked if Hess could give him assurances that Schillinger would not bring up these problems at the meeting, and when Hess could not, Mutter said he would have to find out what to do. It appears, however, though somewhat unclear, that Mutter first told Hess that Schillinger should not go to the meeting and told him to give Schillinger the rest of the day off. Then Mutter checked with his superiors and they concluded that Schillinger should be replaced, and this order came later.

Saturday Hess called Schillinger and asked him to report to Hess's office on Monday, August 22. Schillinger did so and was informed by Hess that he was being terminated from the project at the direction of Peat Marwick. Since Schillinger was a temporary employee for that particular project, and, according to Hess, deemed insufficiently skilled for other jobs, he was terminated from employment with the Respondent.

B. *Analysis and Concluding Findings*

During Schillinger's August 19 discussion with Wilhite, Schillinger noted that he was an experienced union steward and that the employees could use his expertise in resolving the employment problems. Wilhite asked if he was trying to organize a union and Schillinger said no. Wilhite did not relay this particular statement of Schillinger's to Hess or Mutter, although later in the afternoon, without imput from Wilhite, Hess asked if Schillinger was there to organize and Wilite said, ''Absolutely not'' (using Schillinger's words from the morning). Other than these two statements, there is no evidence that any activity on behalf of any labor organization played a role in the Respondent's decision to terminate Schillinger. I do not believe that Schillinger's statement to Wilhite and Hess's question are sufficient to establish a violation of Section 8(a)(3). Therefore, I conclude that an 8(a)(3) violation has not been proven by a preponderance of the credible evidence and I shall recommend that this allegation of the complaint be dismissed.

I further conclude, however, that Schillinger had been engaged in concerted activity protected by Section 7 of the Act, and he was terminated because of a perception that he might continue to do so by expressing concerns of employees at a meeting to be attended by representatives of the State of Michigan. I conclude that Schillinger was not terminated so much for what he did as what Mutter and Hess believed he might do if he continued as an employee.

The Respondent does not dispute that the subject matter discussed by Schillinger with Wilhite and Hess, and which he indicated he would present at the meeting involved issues of mutual aid and protection within the meaning of Section 7. The Respondent contends, however, that Schillinger was, and would have been, acting alone, or in any event had other reasonable avenues of presenting these concerns without airing them to the Peat Marwick client.

One of the seven avenues the Respondent argues was available to Schillinger was the weekly ''Heads Up'' meeting. According to Wilhite it was such a meeting which was to be held on August 19; however, since representatives of Michigan were planning to attend in order to tell the Respondent's employees what a great job they were doing, to air grievances then would have been inappropriate.

Citing *Manimark Corp. v. NLRB*, 7 F.3d 547 (6th Cir. 1993), the Respondent argues that in order to find an employee has engaged in concerted activity, it must be shown that he did more than merely repeat to management jointly held concerns of other employees. In *Manimark*, the employee never told other employees what he was going to do or that he had contacted management. Thus the court found that he was acting in concert with other employees only in a ''theoretical sense'' and such was insufficient to support a violation. Such is not the situation here.

The evidence here establishes that the concerns of employees were being presented to Hess in concert. Schillinger invited Hess to lunch with employees in order to discuss their problems. Hess accepted and heard each employee make a statement. Schillinger opened and closed the discussion.

Employee Hugh Kessler testified that he told Hess privately that he agreed with many of Schillinger's concerns,

but he did not agree with Schillinger's approach. Employee Roger Diamond, called as a witness by the Respondent, testified that Schillinger told Wilhite he intended to speak for all employees at the ''Heads Up'' meeting. Diamond further testified that he had not authorized Schillinger to do so. And Wilhite testified that five other trainers told him they did not wish to be associated with Schillinger.[2] But, this does not prove that Schillinger did not have the authorization of others or, more importantly, would not have been engaged in the furtherance of concerted action had he attended and spoken at the afternoon meeting.

Notwithstanding evidence that Schillinger did not have the total support of other trainers, I conclude that his activity was concerted within the meaning of the Act. Employees had discussed these matters and following Schillinger talking with Wilhite on the morning of August 19, Hess met with Schillinger and others at noon during which their concerns were discussed.

Clearly the activity of Schillinger comes within the broad definition of ''concerted activity'' accepted by the Board in *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), that ''encompasses those circumstances where individual employees seek to initiate or induce or to prepare for group action.'' 281 NLRB at 887. The fact that an employee may act alone during some phase of concerted presentation of employee grievances does not mean he is thereby outside the protection of the Act. See also *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964).

Unlike *Manimark* and other cases cited by the Respondent, the discharge of Schillinger was a preemptive strike. It was unknown to Mutter, and I find of no importance to him, whether Schillinger's intention to speak at the afternoon meeting was to be in aid of concerted activity. Mutter told Hess to remove Schillinger because Schillinger said he would bring up employee grievances at the meeting. Mutter's order had nothing to do with whether Schillinger intended to act alone or in concert. But the Respondent argues that Schillinger was (or would have been) acting alone; therefore, discharging him was not a violation of the Act. I disagree, and conclude that if Schillinger had been allowed to attend the meeting and had he spoken, it is more probable than not that he would have been engaged in concerted activity.

Citing *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), the Respondent argues there are limits to concerted activity which is protected. In *Jefferson Standard*, employees had directed handbills to customers of the TV station which, in essence, suggested that the TV station was not giving its customers good service. For this the employees were discharged. The Respondent analogizes the customers in *Jefferson Standard* with the client of Peat Marwick in this matter. While that analogy may be reasonable, the message to be delivered here is fundamentally different from that in *Jefferson Standard*. The message in *Jefferson Standard* had nothing to do with the wages, hours, or other terms and conditions of employment of the employees. Here Schillinger complained about, and intended to bring up, matters directly relating to the employment of all the trainers—long hours, inadequate preparation time, failure to pay overtime, and the like.

The question is whether an employer can make (or as is the case here, acquiesce in) a rule that restricts employees' ability to engage in concerted activity by prohibiting communication with third parties. I conclude not. The Board has repeatedly held that employees may, with the protection of Section 7, communicate with third parties about matters relating to an ongoing labor dispute. See *Sacramento Union*, 291 NLRB 540 (1988), and cases cited therein, particularly including *Emarco, Inc.*, 284 NLRB 832 (1987) (Chairman Dotson dissenting), and *Cordura Publications*, 280 NLRB 230 (1986) (Chairman Dotson dissenting), when the employees wrote to the respondent's parent company. The caveat in these cases is that the communication not be so disloyal or maliciously false to remove the employees from the protection of the Act.

The complaints here were not false. Hess agreed that there were problems along the lines complained of and that steps were being taken to correct them. There is no argument that Schillinger had made disloyal or deliberately false statements, or that there was a reasonable fear he would do so when talking to representatives of the State. The totality of the Respondent's argument is that Peat Marwick had a rule making it inappropriate for the Respondent's employees to take their employment concerns to ''the client'' and since Schillinger would not give sufficient assurance he would not do so, Peat Marwick asked that he be replaced. This resulted in Schillinger's discharge and was violative of the Act.

The Respondent contends the Peat Marwick rule was designed to protect its legitimate interests; thus, even if enforcement of the rule ''might have the ancillary effect of discouraging participation unprotected activities,'' it is nonetheless lawful, citing *Union Carbide Corp. v. NLRB*, 714 F.2d 657 (6th Cir. 1983). *Union Carbide* is inapposite. There, in dicta, the court approved the Board's decision that an employer has a basic right to restrict the use of its property. Union Carbide does not speak to the matter of an employer making rules restricting the presentation of grievances, nor was such an issue for decision.

The Respondent further relies on *NLRB v. Truck Drivers Local 705*, 630 F.2d 505 (7th Cir. 1980), denying enforcement of a Board order that two of the Union's business agents were unlawfully discharged because they pressed for a wage increase. The employees had first, and inappropriately, asked for the wage increase at a steward's meeting. They knew, and were told, such was not the proper time or place for such a demand, nevertheless, no action was then taken against them for having done so. They were told they would get a wage increase when they deserved one.

The court did say: ''That employees are protected while presenting wage complaints does not give them carte blanche in choosing the method of presentation, or in their choice of time and place for making those complaints.'' However, this was not the basis for the denial of enforcement. The court found that in addition to asking for a wage increase at the steward's meeting, which as long term business agents they knew was an inappropriate forum, they misused the CB radio and passed out flyers at a civic luncheon to the embarrassment of the Union. Further, the executive board had recommended their discharge for poor performance a few months preceding these events, but as with presenting a wage

[2] This was unobjected to hearsay and is therefore considered for the truth of the fact assertion. *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1554 fn. 15 (D.C. Cir. 1984).

demand at the stewards meeting, they had been given a ''second chance.'' The court said, ''There must be room in the law for a right of an employer somewhere, some time, at some state, to free itself of continuing, unproductive, internal, and improper harassment.'' 630 F.2d at 509.

This holding does not mean that an employer can make rules restricting employees from engaging in protected, concerted activity and then require their discharge on the anticipation that the rule might be broken.

Finally, the Respondent argues that in order to be protected by the Act, concerted activity must arise out of a labor dispute, again citing *Jefferson Standard*, supra, and there was no such dispute here within the meaning of Section 2(9) of the Act. I reject this contention. First, neither *Jefferson Standard* nor any other case of which I am aware so hold and second, here there was a controversy between employees and the Respondent concerning some conditions of employment, which would certainly be a matter will within Section 2(9).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I conclude that it must be ordered to cease and desist such activity and to take certain affirmative action designed to effectuate the policies of the Act.

Although Schillinger was hired as a temporary employee for the Peat Marwick project only, it is uncertain whether in fact his employment would have ended in November when the project was completed. About one-half of the others so hired continue to work for the Respondent on other projects. Therefore, whether his employment would have ended in November or continued on are equally likely. I do not accept as dispositive Hess's brief and self-serving statement that Schillinger lacked the skills for other jobs. In such matters, typically in the construction industry, the traditional remedy is ordered, leaving to the compliance stage the issue of whether in fact the individual discriminated against would have been terminated at the completion of the job for which he was hired. *Dean General Contractors*, 285 NLRB 573 (1987) (Chairman Dotson dissenting).

I shall recommend that Laurence Schillinger be offered reinstatement to his former or substantially equivalent position of employment and be made whole for any loss of earnings and other benefits he may have suffered, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Compuware Corporation, Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, or otherwise discriminating against, employees because they engage in concerted activity protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Laurence Schillinger immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the Remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify Schillinger in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Farmington Hills, Michigan facility copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''